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82-477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

H.J.T. HERZOG,

Petitioner,

vs.

DAYTON BAR ASSOCIATION, and,
LEONARD STERN – OHIO STATE BAR
ASSOCIATION DISCIPLINARY COUNSEL,

Relators.

PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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STATEMENT OF QUESTIONS PRESENTED

1. Disciplinary Rule 2-103 (A) of the Ohio Code of Professional Responsibility for attorneys, as applied in this case, contravenes the United States Constitution, First Amendment.

2. Section 7 of Ohio Rule V for the Government of the Bar contravenes the Equal Protection Clause of the 14th Amendment to the United States Constitution.

3. Section 7 of Ohio Rule V for the Government of the Bar contravenes the Due Process of Law Clause of the 14th Amendment to the United States Constitution.

4. Section 7 of Ohio Rule V for the Government of the Bar is illegal as applied to petitioner in that it works the corruption of a Bill of Attainder against him.

5. Section 7 of Ohio Rule V for the Government of the Bar is illegal in that it applies an ex post facto law against the petitioner in contravention of the United States Constitution.

6. Section 7 of Ohio Rule V for the Government of the Bar contravenes the Double Jeopardy provision of the 5th Amendment to the United States Constitution.

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CITATION TO OPINION BELOW

The Ohio Supreme Court opinion is reported at *Dayton Bar Association et al.* v. *Herzog*, 70 O. St. 2d 261 (1982), here attached as appendix A.

JURISDICTIONAL GROUNDS

The judgment of the Ohio Supreme Court was entered June 23, 1982. A petition for stay is pending in that Court. Notice of Appeal (petition) was filed August 5, 1982, *see*, 28 USC 2101 (c), Supreme Court Rule 20 (2).

Jurisdiction is invoked per 28 USC 1257 (3) in that petitioner was deprived of rights secured to him by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Disciplinary Rule 2-103 (A) of the Ohio Canons of Ethics:

> "A lawyer shall not recommend employment . . . of himself . . . to a non-lawyer who has not sought his advice. . . ."

2. Ohio Rule V for the Government of the Bar, section 7:

> "Effect of Discipline: . . . A person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. . . ."

3. UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN:

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws. . . ."

4. UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN:

> "No state shall . . . deprive any person of . . . property without due process of law. . . ."

5. UNITED STATES CONSTITUTION, AMENDMENT ONE:

> "Congress shall make no law . . . abridging freedom of speech. . . ."

6. UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10:

"No state shall . . . pass any Bill of Attainder. . . ."

7. UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10:

"No state shall . . . pass any . . . ex post facto law. . . ."

8. UNITED STATES CONSTITUTION, AMENDMENT FIVE:

"No person shall be . . . subject for the same offense to be twice put in jeopardy. . . ."

STATEMENT OF THE CASE AND FACTS

Relators filed complaints against petitioner with the Ohio Supreme Court's Board of Commissioners on Discipline and Grievances April 13, 1981 and oral hearing before a three member panel of the Board (three practicing attorneys chosen by the Supreme Court) was held November 5 and 6, 1981 after which a recommendation to the Ohio Supreme Court was filed January 29, 1982. Thereafter, briefs were filed and argument had in the Ohio Supreme Court. Four charges of violations of the canons of professional ethics had been filed against petitioner: failure to pay funds promptly to a client, of which he was found guilty; neglecting a legal matter, of which he was found guilty; soliciting professional employment, of which he was found guilty; and, a fourth charge, not relevant here, of which he was found not guilty.

The Board of Commissioners and the Supreme Court of Ohio were both of the opinion that had this been peti-

tioner's first disciplinary offense, proper punishment would have been a one year suspension from the practice, considerably less severe than permanent disbarment; however, since petitioner had been once before, in 1962, indefinitely suspended from practice in Ohio (also for solicitation of legal business, an apparent victim at that time of insufficiently developed federal first amendment doctrine, *see, Dayton Bar Association* v. *Herzog*, 173 O. St. 313 (1962)), the Board recommended, and the Supreme Court of Ohio agreed, that punishmet be raised to permanent disbarment. This was allegedly required by the terms of Ohio Rule V for the Government of the Bar, section 7, which mandates stricter punishments in subsequent disciplinary proceedings for Ohio lawyers with no consideration whatever to how such a Rule may lead to injustice under the circumstances of particular cases.

One of the counts of which petitioner was found guilty had to do with direct mail solicitation of legal business, and apparently because of recent decisions of this Federal Supreme Court, the Ohio Court attempted to explain away the harsh penalty given petitioner in a lengthly footnote to its opinion, *see,* Appendix A, by explaining that even without the Federal First Amendment implications of the direct mail solicitation charge, it could have disbarred petitioner on only the two remaining counts of which he was found guilty anyway. In plain English, although the Ohio Court admitted that had this been a first time before the Displinary Board, petitioner would have received only a one year suspension if guilty of three counts, the Court was able to place its disbarment of him on the basis of only two lesser counts, again all because of the peculiarly harsh section 7 of Rule V for the Bar's Government.

Although the file of this case is particularly volumninous,

and petitioner personally and his retained counsel presented many arguments to the Ohio Supreme Court, nothing availed in the face of manifest Federal Constitutional anomalies in the Ohio Procedure. Only scrupulous review by this Court will protect petitioner and all other Ohio attorneys similarly situated from manifest misapplication of Federal Constitutional doctrine to their clear detriment.

REASONS FOR GRANTING THE WRIT IN THIS CASE

1. The Ohio Supreme Court has virtually admitted to deciding a federal question in a way which directly conflicts with decisions of other state courts of last resort and federal courts on the very same subject, *see,* ARGUMENT A, *infra,* and, APPENDIX A.

2. The Ohio Supreme Court has virtually admitted to deciding a federal question in a way which conflicts with very recent decisions of this Court, *see,* ARGUMENT A, *infra,* and, APPENDIX A.

3. It is manifest and indisputable that the manner in which the Ohio Supreme Court applies its section 7 of Rule V for the Government of the Bar clearly and on the face of the procedure: denies petitioner the equal protection of the laws; denies the petitioner due process of law; works the corruption of a Bill of Attainder against petitioner and all others similarly situated; applies an ex post facto law against petitioner; and, manifestly violates on its face the right of petitioner not to be placed twice in jeopardy for one and the same offense. *See,* ARGUMENTS B, C, D, E AND F, *infra,* and the clearly applicable authorities pointed out therein.

THE ARGUMENTS FOR THE WRIT

A. DISCIPLINARY ACTION ON THE FOURTH CHARGE AGAINST PETITIONER IMPERMISSIBLY CONTRAVENES THE FIRST AMENDMENT TO THE FEDERAL CONSTITUTION.

Factually, petitioner admits, with regard to one of the charges upon which his disbarment was based, that he did solicit clients by direct mail. Thus, no factual dispute is presented; but, petitioner's Federal First Amendment rights are violated by such action. The Ohio Supreme Court action not only contravenes decisions of other state courts of last resort on this issue, but, more importantly, clearly contravenes recent decisions of this Court on the exact same issue and thus cannot stand.

First, the view of this Court. Commercial speech has First Amendment protection, *Bigelow* v. *Virginia*, 421 US 809 (1975), and this protection applies to the right of attorneys to advertise, *Bates* v. *Arizona Bar*, 433 US 350 (1977) (where all of the justices rejected the view that lawyer advertising has an inherent tendency to mislead the public). A lawyer may not be disciplined for contacting a non-client by letter regarding possible legal remedies, *In re Primus*, 436 US 412 (1978). Chimerical fears do not justify proscription. Rules regarding solicitation must be narrowly drawn. Mere potential for conflict or over-reaching does not justify interference with First Amendment activity. Time, place and manner solicitation regulation is permitted under the Constitution if the aim is to prohibit that which is *in fact* misleading, deceptive, overbearing or improper, *In re Primus*, *supra*, pp. 437-438. The attorney need not justify his use of free speech; the bar association or court must justify its

curtailment. In the most recent decision in this area, *In re RMJ*, 102 S. Ct. 929 (1982), even the sole dissenting justice in *In re Primus* was brought around, apparently, to the view that the full panoply of First Amendment protections apply to attorneys. Again, petitioner in no way denies here that he solicited clients by direct mail. He asserts a right to do so, and this Court's most recent pronouncements protect that right. The Ohio Supreme Court's decision here directly contravenes the most recent rulings of this Court on this most important federal issue.

The Ohio Court's decision here also contravenes the decisions of sister state supreme courts on the Federal First Amendment question, viz., California in *Jacoby* v. *California Bar*, 138 Calif. Rptr. 77 (1977); Illinois in *In re Madsen*, 68 Ill. 2d 472 (1977) (where the Court noted that *Bates, supra*, has probably outlawed attorney discipline for direct mail advertising or soliciting); esteemed Kentucky in *Kentucky State Bar Association* v. *Stuart*, 568 SW2d 933 (1978) (Unanimous decision: "In all advertising there is the potential for deception and over-reaching statements. The fact that an advertisement is in the form of a letter does not increase the liklihood of these evils. . . .", *Stuart, supra*, p.934); New York in *Koffler* v. *Joint Bar*, 412 NE 2d 927 (1980) (unanimous decision: "Direct mail solicitation of potential clients by lawyers is constitutionally protected speech which may be regulated but not proscribed," *Koffler, supra*, p.929). Minnesota has reached the same result. *See also, Bishop* v. *Bar Committee*, 521 F. Supp. 1219 (S.D. Iowa 1981), *Durham* v. *Brock*, 498 F. Supp. 213 (M.D. Tenn. 1980). "The handwriting is on the wall." Lawyer direct mail solicitation can be proscribed only when *in fact* deceptive or misleading. *See generally*, "Birth of a Salesman: Lawyer Advertising and Solicitation," Lori B. Andrews. ABA Press,

1981. (In anticipation, should the state cite the case, *Ohralik* v. *Ohio Bar*, 436 US 477 (1978) has nothing to do with any matters raised in this petition.)

A SPECIAL NOTE REGARDING "ARGUMENT A"

It should not escape the attention of this Court that section 7 of Ohio Rule V for the Government of the Bar, upon which petitioner's disbarment was based is particularly pernicious in its effect upon the First Amendment in this particular case. The reason for this is that, as will be argued extensively, *infra*, Rule V, section 7 substantially increases penalties in Ohio for attorneys who are disciplined on more than one occasion, as was your petitioner; however, the prior disciplinary matter (in 1962) also had to do with solicitation of legal business — a situation for which petitioner in all probability could not be, under the First Amendment, disciplined today. Thus, in addition to the other infirmities of Rule V, section 7 discussed *infra*, the manner of application of that Rule in this particular case has the effect of further exacerbating the most severe sanctions and penalties because of nothing more than petitioner's long term dedication to First Amendment philosophy and principles. Indeed, for this reason alone the Rule V, section 7 Bill of Attainder is particularly vindictive and harsh, unconstitutionally so, in this case.

B. OHIO RULE V, SECTION 7 CONTRAVENES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The equal protection clause of the Federal Constitution forbids regulations which regulate or forbid the practice of law without rational connection to one's ability or fitness therefore, *Attwell* v. *Nichols,* 466 F. Supp. 206 (D.C. Ga. 1979), and the Supreme Court will carefully review state disbarment orders where it is substantially alleged that the equal protection clause has been violated, *Lenske* v. *Sercombe,* 266 F. Supp. 669 (D.C. Oregon 1967). Equal protection, for example, has been held violated by a rule which forbade law professors to practice law, *Atkinson* v. *Trustees,* 559 SW2d 473 (Ark. 1977).

In this case, petitioner had four charges against him, was found not guilty of one, and guilty on another with serious First Amendment implications, and guilty of two others of a rather minor nature. Yet, his punishment, under the Ohio rules, had to be raised from a one year suspension, an admittedly fair (from the Bar Association's point of view) sanction, to the ultimate penalty, disbarment, due to Governing Rule V, section 7, which provides that:

> "A person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct."

Due to the above Rule, since he had been disciplined thirteen years before, also for interpreting the First Amendment liberally, petitioner's sanction was raised from one year suspension to the harsh ultimate penalty. He was

punished as if he were a habitual criminal, when he is only a habitual attorney. When reinstated in 1975, nonetheless, petitioner was not reinstated, on a fair interpretation, as a "tainted, second class" attorney, but to all rights and privileges appurtenant to the office. He either became a full-fledged attorney again or he did not; if not, he should not have been reinstated. The equal protection clause tolerates no second class citizens; yet, the operation of Rule V, section 7 was to reinstate petitioner as a second class attorney – one "tainted" with a prior history of First Amendment zeal whose "number" was not a lucky one to have. Although it may have been approaching rather slowly, he was clearly placed in the path of the train oncoming. Yet, surely the equal protection clause tolerates no state-created "second-class lawyers" no more than second-class citizens. Surely, all lawyers allowed to practice must at all times be governed and sanctioned by the same standards; otherwise, we have some lawyers who are, in Orweil-like fashion, more equal than others – namely, those lucky ones who have yet to be disciplined for the first time. And what strangely arbitrary results can arise under Rule V, section 7: a lawyer being disciplined the second time for neglecting a traffic ticket can be punished more severely than one being disciplined the first time for neglecting a capital case. This is bizarre, absurd, irrational on its face and manifestly unfair.

C. SECTION 7, RULE V OF THE OHIO RULES FOR THE GOVERNMENT OF THE BAR IS A BILL OF ATTAINDER.

No state shall pass any Bill of Attainder, Article I, section 10, United States Constitution. Such a Bill is a legislative act inflicting punishment without trial; if the penalty be less than death, it is called a "Bill of Pains and Penalties," but both are encompassed in the Constitutional prohibition. The essence of these Bills is that guilt and the need for punishment are simply assumed and certain persons or groups are "attainted" with the stigma desired, *Cummings* v. *Missouri*, 71 US 277 (1866). It cannot be reasonably denied that the Ohio Supreme Court acts legislatively when it promulgates rules for the government of the bar. Rule V, section 7 is a Bill of Attainder. Such a Bill may affect life or property, *Fletcher* v. *Peck*, 10 US 87 (1810). Statutory enactments punishing defined individuals without benefit of trial is exactly what a Bill of Attainder is, *US* v. *Brown*, 381 US 437 (1965). *Benbol* v. *Carroll*, 494 F. Supp. 462 (W.D.Ky. 1977), *Crain* v. *Mountain Home*, 611 F2d 726 (8th Cir. 1979), *US* v. *Lovett*, 328 US 303 (1946), (cases dealing with attainted attorneys, communists, labor leaders, public employees, and other "second class" persons).

When it promulgated Rule V, section 7, the Ohio Supreme Court legislatively enacted a law condemning without trial a class of persons, lawyers who had been previously disciplined, to punishment greater than others would receive for the same conduct. Even under well recognized "habitual offender" statutes, the accused gets a trial by jury if he wishes: not so Ohio attorneys. Herzog was given a trial on the four charges actually placed against him, found not guilty of one, and just punishment for

the others reckoned to be a year suspension; however, a special law for his benefit, a Bill of Attainder, had been enacted, so his punishment was increased. Naturally, under the Ohio scheme, he had no trial on the "increase": that was free.

D. SECTION 7, RULE V OF THE OHIO RULES FOR THE GOVERNMENT OF THE BAR IS AN EX POST FACTO LAW AS APPLIED TO THE FACTS OF THE PRESENT CASE.

No state shall enact an ex post facto law, Federal Constitution, Article I, section 10.

> "An ex post facto law is one which imposes punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required," *Cummings* v. *Missouri*, 71 US 277 (1866 - syllabus 3).

There are clearly three kinds of ex post facto law in the above scheme. Section 7, Rule V contravenes all. Firstly, Herzog's reinstatement to the bar in 1975 was not punishable by the Ohio Supreme Court at that time, obviously, or he would not have been re-admitted, but the present case dealt to him a punishment because he had been re-admitted, albeit as a "tainted, second class lawyer." Secondly, the proper punishment for Herzog in this case was always admitted to be a year suspension, yet the harsher, disbarment, was added pursuant to the section 7, Rule V Bill of Attainder. Thirdly, less testimony was certainly used to disbar him in 1982 (namely, *none*) than was needed to suspend him in 1962 or to suspend him for

a year in 1982. All three tests of the ex post facto law are thus met and your petitioner is the victim.

E. SECTION 7, RULE V OF THE OHIO RULES FOR THE GOVERNMENT OF THE BAR CONTRAVENES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

A license to practice law is a right (in property) which, once given, cannot be capriciously taken away: withdrawal of this right should only be exercised in clear cases of misconduct which affect the standing and character of the party qua lawyer, *Chareton* v. *FTC*, 543 F2d 903 (D.C. Cir. 1976). Although wide discretion is allowed states in attorney discipline, they may not behave arbitrarily with regard to attorneys, nor capriciously deprive them of the means to a livlihood, *Erdmann* v. *Stevens*, 458 F2d 1205 (2d Cir. 1972).

In Ohio, section 7, Rule V for the Government of the Bar automatically mandates stricter punishment for attorneys who are disciplined for the second time, regardless of any merit to differences between individual cases and regardless of any substantive difference in the relative seriousness even of the first and second offenses as compared not only to offenses committed by other attorneys similarly situated, but as weighed judgmentally with each other. Such a scheme is patently irrational on its face, so utterly repugnant to all concepts of fundamental fairness now rooted firmly in our jurisprudential system as to clearly, if used, deprive one of the due process of law guaranteed by the Fourth Amendment.

F. SECTION 7, RULE V OF THE OHIO RULES FOR THE GOVERNMENT OF THE BAR, AS APPLIED IN THIS CASE, CONTRAVENES THE PROHIBITION AGAINST DOUBLE JEOPARDY CONTAINED IN THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION.

It is clear that disbarment proceedings are adverserial and quasi criminal in nature since they impose a substantial penalty on the lawyer, *In re Ruffalo*, 390 US 544 (1968). Such proceedings are comparable to criminal, not civil, proceedings, *Erdmann* v. *Stevens, supra,* and, even some civil matters which are basically punitive in character are barred (by the double jeopardy clause) by prior criminal conviction for the same offense, *US* v. *LaFranca*, 282 US 568 (1931). So-called "quasi-criminal" matters, such as attorney disciplinary proceedings, are clearly governed by the requirements of the double jeopardy clause, *E. F. Hutton and Company* v. *Anderson*, 596 P2d 413 (Colo. 1979). Multiple punishments for the same offense are not allowed, *Taylor* v. *Gray*, 375 F. Supp. 790 (D.C. Wis. 1974), and punitive "type" sanctions, successively imposed, are prohibited, *Paine* v. *University of Texas*, 355 F. Supp. 199 (D.C. Texas 1972).

Section 7, Rule V is contrary to the above mandatory constitutional standards in the following particulars. Your petitioner was indefinitely suspended from the practice of law in Ohio in 1962 for soliciting legal business in a manner which would be protected by modern First Amendment doctrine. Nonetheless, he remained suspended for thirteen years and was reinstated in 1975. In 1982, having been found guilty again he was, according to the Ohio Supreme Court, deserving of a one year suspension; however, due to prior discipline, his punishment was increased to the ultimate penalty for a lawyer. More precisely:

for his 1982 direct mail petitioner was given a one year suspension (first in jeopardy); then (due to the arbitrary operation of section 7, Rule V), *for his 1982 direct mail* petitioner was disbarred permanently (second in jeopardy *and* punished secondly and more). It is clear that petitioner has been the victim of contravention of one of the most sacred principles of our criminal law: "No person shall be . . . subject for the same offense to be twice put in jeopardy. . . .", Federal Constitution, Amendment Five.

CONCLUSION

It is manifestly clear that the Writ should issue because the Ohio Supreme Court has: interpreted federal law differently than this Court: interpreted federal law differently than other state supreme courts: clearly violated several federal constitutional guarantees of your petitioner.

RESPECTFULLY SUBMITTED.

HERBERT CREECH, JR.,
ESQUIRE OF THE OHIO BAR.

APPENDIX A

DAYTON BAR ASSOCIATION ET AL. v. HERZOG.

[Cite as Dayton Bar Assn. v. Herzog (1982), 70 Ohio St. 2d 261.]

Attorneys at law—Misconduct—Permanent disbarment—Acts warranting—Soliciting professional employment by mail.

(D.D. No. 82-3—Decided June 23, 1982.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

Relators, Dayton Bar Association ("DBA") and the Disciplinary Counsel of the Supreme Court of Ohio ("Disciplinary Counsel"), filed a complaint against respondent. Harold J. T. Herzog, with the Board of Commissioners on Grievances and Discipline ("board"). DBA asserted three claims of misconduct, and the Disciplinary Counsel added a fourth. The board held a private hearing in Dayton on November 5 and 6, 1981. A summary of the evidence and stipulations before the board follows.

As to the first claim, respondent collected funds on behalf of a client corporation. He told the client that he would reimburse it, but did not do so until after a complaint was filed with the DBA. Prior to payment, however, respondent deposited the funds in his trust account and wrote checks on that account to his ex-wife, his daughter, the telephone company and "cash." During much of this time, the account balance was less than that owed to this client.

The board found that this conduct was in violation of DR 9-102 (B) (4), which requires that a lawyer promptly pay a client those funds the client is entitled to receive.

In a separate claim, respondent had not conducted discovery in a personal injury case, although opposing counsel had deposed his clients, the plaintiffs. At a pretrial, the trial judge informed respondent that, if his clients proved the facts alleged in the complaint, the court would nevertheless have to direct a verdict for the defendants. One of the defense counsel in that case testified that respondent wanted a continuance and was not prepared to go forward on the case. Without his clients' consent, respondent agreed to dismiss the case, because he believed the voluntary dismissal would toll the statute of limitations. Respondent concedes, however, that this belief was in error.

Respondent's clients moved to Columbus. It is disputed whether he informed them of these developments. At the time of the hearing in this case, respondent had not forwarded the papers of these clients to their Columbus counsel as requested.

The board found that this conduct was in violation of DR 6-101 (A) (3), which prohibits a lawyer from neglecting a legal matter entrusted to him.

DBA filed an additional claim for misconduct. The board found, however, that the evidence did not support the claim.

The Disciplinary Counsel also filed a claim because respondent mailed between 500 and 1,000 letters to defendants in Dayton Municipal Court cases which were listed in the "Daily Court Reporter." There were two different form letters used, but each referred to a "new federal law" as a means of forestalling collections and invited the recipients to call respondent's office for an appointment.

The board found that this conduct violated DR 2-103, because respondent directly solicited or attempted to solicit professional employment.

Upon consideration of the prior indefinite suspension of respondent from the practice of law in 1962, his reinstatement in 1975 and the findings of misconduct, the board recommended that respondent be permanently disbarred.

Mr. Howard P. Krisher, II, for relator Dayton Bar Assn.

Mr. Charles W. Kettlewell, for relator Disciplinary Counsel.

Messrs, Butler, Cincione, DiCuccio & Dritz and *Mr. Robert A. Butler*, for respondent.

Per Curiam. After an examination and review of the record in this cause, this court concurs with the findings of fact and recommendation of the board of commissioners. Gov. R. V (7) provides in part: "• • • A person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct. • • •" In view of respondent's prior indefinite suspension, *Dayton Bar Assn.* v. *Herzog* (1962), 173 Ohio St. 313, and subsequent reinstatement, it is ordered, pursuant to Gov. R. V (7), that respondent be permanently bisbarred from the practice of law.•

Judgment accordingly.

CELEBREZZE, C. J., W. BROWN, SWEENEY, LOCHER, HOLMES, C. BROWN and KRUPANSKY, JJ., concur.

• We note specifically that, in light of Gov. R. V(7), our finding that respondent violated DR 9-102(B)(4) and DR 6-101(A)(3) requires that respondent be permanently disbarred. Therefore, our finding of misconduct as to the solicitation claim does not affect the result. Respondent posits, however, that the holding of the United States

Supreme Court in *In re R.M.J.* (1982), — U.S. —, 71 L.Ed.2d 64, bars any finding of misconduct as to that claim. We disagree and concur with the board's finding that respondent violated DR 2-103.

In re R.M.J. differs as to the facts and the law. In that case, the attorney challenged the constitutionality of Missouri's DR 2-101 which limited the content of advertisments. See *In re R.M.J.* (Mo. 1980), 609 S. W. 2d 411, appendix, at 412-413. The attorney in that case also mailed announcement cards to persons other than those listed in Missouri. DR 2-102. As to this latter issue, however, the United States Supreme Court noted: "• • • [W]e deal with a silent record." *In re R.M.J., supra*, at 76.

This case, however, involves violation of DR 2-103, and the record is anything but silent. One of the form letters which the respondent, in this case sent stated: "There is a new federal law that can save your job, car, bank account, stop repossessions and garnishments and gas and electric turn-offs." The other form letter contained a similar statement. Each letter encouraged the reader to call respondent's office for an appointment. This patent solicitation is not the type of constitutionally protected commercial speech discussed in *Bates* v. *State Bar of Arizona* (1977), 433 U.S. 350, rehearing denied, 434 U.S. 881, and *In re R.M.J., supra* (— U.S. ——). Rather, respondent's letters create a "potential for overreaching • • • [and a] need for prophylactic regulation in furtherance of the State's interest in protecting the lay public." *Ohralik* v. *Ohio State Bar Assn.* (1978), 436 U. S. 447, 468, rehearing denied, 439 U. S. 883. In *Ohralik*, the United States Supreme Court upheld the constitutionality of DR 2-103(A) as applied to in-person solicitation of professional employment. DR 2-103, as applied in this case, serves the state's interest in protecting the lay public from mail solicitation of professional employment as well.

APPENDIX B

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

CASE No. 395

In re:
Complaint against:

H. J. T. HERZOG,

Respondent,

DAYTON BAR ASSOCIATION AND
LEONARD J. STERN,
DISCIPLINARY COUNSEL,

Relators.

(Filed January 29, 1982)

Findings of Fact and Recommendation of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio

---

This proceeding was held on November 5 and November 6, 1981, in the Court of Appeals Courtroom in the Montgomery County Courts Building, in Dayton, Ohio, by a panel consisting of Thomas J. Manahan, Chairman, Robert

W. Blakemore and Thomas J. Grady. The Dayton Bar Association was represented by Attorney Howard Penn Krisher, II. The Respondent was represented by Attorney Robert Butler of Columbus, Ohio. Charles W. Kettlewell, of the Office of Disciplinary Counsel, by agreement, did not appear for the hearing because of a stipulation of facts of the fourth claim of misconduct, the claim with which he was directly concerned.

At the request of respondent, the hearing was conducted in private.

I. The first claim of misconduct charged that respondent had collected sums of money owing to a client, Hendricks & Son Ready Mix Concrete, but had not notified the client of the collection of the money and had not promptly paid or delivered the funds to the client. A stipulation of many of the facts relating to the four claims of misconduct on the part of this respondent had been entered into prior to the hearing, and a total of fifty-two stipulated exhibits were offered by relator.

The stipulations and exhibits established that respondent had collected, in March of 1979, $806.76 from a customer of his client, Luther Gordon, and that in May of 1979, he had collected $1,280.66 from another customer, Tonkovich. These funds were deposited in respondent's trust account.

Thereafter, on one occasion, Tonkovich was refused credit by the Cement Company because it was believed that he had not paid the bill owing to that company. Respondent was requested to reimburse the client for these funds, stated that he would do so, but did not do so. Eventually, after a complaint was filed with the Dayton Bar Association, respondent, in June of 1980, forwarded these funds to the clients.

The exhibits admitted in evidence established that during the time these funds were supposed to be in the trust

account of respondent, checks were written out of that account to his ex-wife, his daughter, the telephone company, and on numerous occasions, checks to "cash" were written out of the account. During a great part of this time, the balance in the account was not sufficient to cover the funds owed to these two clients.

Respondent's defense was that in the collection business, the client is not always immediately reimbursed, but that periodic accountings are the custom and practice. In addition, respondent stated that the Internal Revenue Service had levied on his trust account, but the evidence disclosed that these levies were not initiated until December of 1979, nine and six months, respectively, after the funds were received, and after requests had been made by the client to forward the funds.

Relator charged that respondent had violated DR 1-102 (A) (6), DR 9-102 (B) (1) and DR 9-102 (B) (4) of the Code of Professional Responsibility. The Board finds no violation of DR 1-102 (A) (6) or DR 9-102 (B) (1), but does find that respondent violated DR 9-102 (B) (4).

II. The second claim of misconduct was that respondent had been retained as counsel by Georgia Louise Carter, to act as attorney for the estate of her deceased husband, Melvin E. Carter. The principal asset of Mr. Carter's estate was the residence property which was held as a tenancy in common with his wife.

The respondent testified that he advised Mrs. Carter to avoid the expense of probate proceedings, because of her limited financial status, and suggested that she wait until she had decided to sell the residence before beginning such proceedings.

Respondent also arranged for an appraisal of the residence to be made at that time.

Thereafter, Mrs. Carter contacted respondent and advised him that she was in a position to sell the residence. Respondent then filed an application to admit the will to probate and letters testamentary were issued to Mrs. Carter and the real estate was sold, leaving a net balance of $19,000.00. Pursuant to respondent's instruction, Mrs. Carter retained $9,500.00 of the balance for herself, and $9,500.00 was deposited into an estate account.

No Certificate of transfer was filed by respondent. Under the terms of Melvin E. Carter's will, his wife was to receive his one-half interest in the real estate.

Respondent did not file an inventory or account in the Melvin Carter estate despite receiving notices to do so by the Probate Court of Montgomery County, Ohio.

Thereafter, Georgia Louise Carter died and her daughter retained Attorney James Mitchell to handle the probate proceedings for that estate. Although Mr. Mitchell made several requests of respondent for documents to assist him in the handling of the estate of Mrs. Carter, respondent did not comply with these requests, until August 29, 1980.

Relator charged respondent with violation of DR 6-101 (A) (3), namely, neglecting a legal matter entrusted to him.

The Board is of the opinion that respondent was discourteous to counsel handling the estate of Mrs. Carter, but that respondent was not guilty of violating the disciplinary rule charged and dismisses the second claim of misconduct.

III. The third claim of misconduct was that respondent had been contacted by a Mr. and Mrs. Robert Bowman relative to a claim for personal injuries arising out of a bicycle accident by Mrs. Bowman. At the time that the original contact was made, respondent was still under

suspension from the practice of law, but thereafter, on May 26, 1976, respondent, then reinstated, filed a complaint in the Common Pleas Court of Montgomery County, Ohio, seeking to reciver damages on behalf of the Bowmans. In the complaint, there were six defendants named, and two were subsequently dismissed.

Evidence, including testimony of one of counsel for one of the defendants in that case, established that respondent conducted no discovery in the form of interrogatories or depositions. Depositions of his clients were taken by opposing counsel.

The case was called for a pretrial conference on the Friday before the scheduled trial date of February 4, 1980. Respondent testified that at the pretrial conference, the judge to whom the case had then been assigned, informed him that even if he established all of the facts alleged in the complaint, he would be obliged to direct a verdict for the defendants. Respondent then agreed to a dismissal of the case, believing that voluntary dismissal would toll the running of the statute of limitations applicable to his clients' claims, which he later conceded was an erroneous belief on his part. There was a disput in the evidence as to whether he reported these developments to his clients who had by this time moved to Columbus, Ohio. Respondent produced a copy of a letter addressed to them, but it was stipulated that if the Bowmans were called to testify as witnesses, they would testify that they did not receive this letter. It was also stipulated that respondent did not obtain the consent of his clients to dismiss this action.

One of the defense counsel in that case, Francis McDaniels, testified that he reported to his client after the pre-trial conference that the trial judge had commented that he thought the case might result in a directed verdict,

that respondent stated that he wanted a continuance of the case and that he was not prepared to go forward with trial of the action.

Counsel for respondent stressed that the liability was very questionable.

In any event, thereafter the Bowmans retained Attorney Barry Wolinetz of Columbus, Ohio to represent them in this matter and so advised respondent. Thereafter, Attorney Wolinetz addressed three letters to respondent asking him to forward file material to him so that he could determine what action should be taken on behalf of the Bowmans. Respondent never responded to these letters and, thereafter, Mr. Wolinetz directed a complaint letter to the Dayton Bar Association. At the time of this hearing, respondent had not forwarded any papers to Mr. Wolinetz and offered no explanation for his failure to do so. Relator charged respondent with violations of DR 6-101 (A) (1) and DR 6-101 (A) (3) of the Code of Professional Responsibility. The Board finds that the evidence does not support the charge that respondent violated DR 6-101 (A) (1), namely, attempting to handle a matter which he was not competent to handle, but does find that he violated DR 6-101 (A) (3), neglecting a legal matter entrusted to him.

IV. The fourth claim of misconduct involved alleged violations of DR 2-101 and DR 2-103 of the Code of Professional Rseponsibility. Gov. R. V., Section (3), grants exclusive authority to the office of Disciplinary Counsel of the Supreme Court of Ohio to investigate and file complaints for violations of those rules.

It was stipulated that on or about February 18 or 19 of 1980, respondent mailed approximately 1000 letters to persons whose names he had taken from the "daily court reporter" and persons who were defendants in lawsuits filed

in collection cases in the Dayton Municipal Court. Copies of these letters are attached to the complaint and marked Exhibits 7 and 8. They advise the addressee that he or she is listed as a defendant in a collection suit and advised of consequences that may result from such a suit. The letter also advises that there are remedies available to prevent these actions being taken against them and that they may learn about these remedies by calling respondent's office. In other words, these letters constitute, in the opinion of the Board, direct solicitation of legal business from specific persons, namely, those listed in the "daily court reporter" as defendants in collection suits.

Counsel for respondent argued that no distinction can be drawn between such solicitation and that done by television or by the yellow pages in the telephone directory.

The Board finds that respondent did not violate DR 2-101, which relates to publicity in general, but believes that respondent's actions do violate DR 2-103, which is captioned "Recommendation of Professional Employment." The Board believes that a distinction can be drawn between direct mail solicitation and solicitation by way of telephone directories or television.

The Board finds that as to the first claim of misconduct, respondent did violate DR 9-102 (B) (4) of the Code of Professional Responsibility in failing to properly pay or deliver to the client as requested by the client, funds in possession of the lawyer which the client is entitled to receive.

The Board finds that the evidence does not support the claimed violation in the second claim for misconduct.

The Board finds as to the third claim of misconduct, that respondent did violate DR 6-101 (A) (3) in that he neglected a legal matter entrusted to him.

As to count four, the Board finds that respondent vio-

lated DR 2-103 in that he directly solicited or attempted to solicit employment.

It is alleged in the complaint filed by the Dayton Bar Association, and was admitted in the evidence before the panel that respondent was indefinitely suspended from the practice of law on April 18, 1962, that a Petition for Reinstatement was refused on January 20, 1972, and that a Petition for Reinstatement was granted on June 19, 1975. The evidence disclosed that the basis for the suspension was attempted solicitation of employment.

Counsel for the relator recommended permanent disbarment. This Board recommends that for the actions involved in this matter, a suspension from the practice of law for one year would be warranted.

Upon consideration of the prior iadefinite suspension of respondent from the practice of law in 1962 (Dayton Bar Association v. Herzog, 173 Ohio St. 313), his reinstatement in 1975, and the findings of misconduct by the Board in this case, the Board of Commissioners on Grievances and Discipline recommends, pursuant to the provisions of Section (7), Gov. R. V, that Respondent, H. J. T. Herzog, be permanently disbarred.

/s/
Chairman, Board of Commissioners
on Grievances and Discipline of
The Supreme Court of Ohio

/s/ COIT H. GILBERT
Secretary, Board of Commissioners
on Grievances and Discipline of
The Supreme Court of Ohio

THE STATE OF OHIO
City of Columbus

The Supreme Court of the State of Ohio
Of the Term of January, 1962
To-wit: Wednesday, April 18, 1962

DAYTON BAR ASSOCIATION,

Relator,

v. No. DD26

H. J. T. HERZOG,

Respondent.

ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

This cause came on to be heard upon the Objections by respondent to the Final Report of the Board of Commissioners on Grievances and Discipline and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court that the Objections to the Final Report of the Board of Commissioners are not well taken and should not be sustained for the reasons stated in the opinion filed herein.

It is further ordered and adjudged that the Final Report of the Board of Commissioners on Grievances and Discipline be, and the same hereby is, confirmed and the respondent, H. J. T. Herzog, is indefinitely suspended from the practice of law.

The respondent, H. J. T. Herzog, is hereby ordered to cease and desist from the practice of law in any form and is forbidden to appear on behalf of another before any court, judge, commission, board, administrative agency or other public authority. It is further ordered that he be forbidden to counsel or advise, or prepare legal instruments for others or in any manner perform services of any kind for others which would constitute the practice of law. He is also forbidden to hold himself out to another or to the public as being authorized to perform legal services, and he is hereby divested of each, any and all of the rights, privileges and prerogatives customarily accorded to members in good standing of the legal profession of Ohio.

It is further ordered that the respondent, H. J. T. Herzog, surrender his Certificate of Admission to Practice to the Clerk of this Court on or before May 1, 1962 and that his name be stricken forthwith from the roll of attorneys maintained by this Court.

It is further ordered that the respondent, H. J. T. Herzog, pay the costs of these proceedings taxed in the amount of One Hundred and Sixty Seven dollars and Eighty-Five cents ($167.85).

It is further ordered that a copy of this Entry be certified to the Respondent, to all counsel of record, to the Board of Commissioners on Grievances and Discipline, to the Dayton Bar Association, to the Presiding Judge of the United States District Court for the Southern District of Ohio and to the Presiding Judge of the Court of Common Pleas for Montgomery County, Ohio.

/s/ CARL V. WEYGANDT
CHIEF JUSTICE

THE STATE OF OHIO,
City of Columbus.

1975 TERM

To wit: June 19, 1975

In re Petition for Reinstatement of
H. J. T. HERZOG

No. DD 26

ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

This cause is before the court pursuant to Rule V, Section 26, of the Supreme Court Rules for the Government of the Bar of Ohio upon the report of the Board of Commissioners on Grievances and Discipline recommending the allowance of respondent's petition for reinstatement to the practice of law, which has been heretofore filed and duly referred to the Board for action.

All parties required by Section 22 (c) of said Rule V having received notice of the filing herein of the report and no objections to the recommendation having been filed, the report is confirmed and the petitioner is reinstated to the practice of law upon the payment of all costs of this proceeding including those costs incurred by the Board.

/s/ C. WILLIAM O'NEIL
Chief Justice

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 19th day of June 1975.

THOMAS L. STARTZMAN, Clerk.
By /s/ SAM F. ADKINS, Deputy.

APPENDIX C

STATE OF OHIO,
CITY OF COLUMBUS.

The Supreme Court of the State of Ohio
Of the Term of January, 1982.
To-wit: June 23, 1982.

Dayton Bar Association,

Relator,

v.

H. J. T. Herzog,

Respondent.

ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

DD No. 82-3

ORDER

It appearing to the Court that the Board of Commissioners on Grievances and Discipline filed its Final Report in this Court on February 1, 1982, recommending that the

respondent, H. J. T. Herzog, be permanently disbarred from the practice of law, pursuant to Section 6a of Rule V of the Supreme Court Rules for the Government of the Bar of Ohio, and it further appearing that Respondent filed objections to the Final Report of the Board of Commissioners on Grievances and Discipline, this cause was argued before the Court. On consideration thereof, it is ordered and adjudged by this court that the respondent, H. J. T. Herzog, be permanently disbarred from the practice of law pursuant to Section 6a of Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.

The respondent, H. J. T. Herzog, is hereby ordered to cease and desist from the practice of law in any form and is forbidden to appear on behalf of another before any court, judge, commission, board, administrative agency or other public authority. It is further ordered that he be forbidden to counsel or advise, or prepare legal instruments for others or in any manner perform services of any kind for others which would constitute the practice of law. He is also forbidden to hold himself out to another or to the public as being authorized to perform legal services, and he is hereby divested of each, any and all of the rights, privileges and prerogatives customarily accorded to a member in good standing of the legal profession of Ohio.

It is further ordered that the respondent, H. J. T. Herzog, surrender his certificate of admission to practice to the Clerk of this Court forthwith and that his name be stricken from the roll of attorneys maintained by this Court.

It is further ordered that the respondent, H. J. T. Herzog, pay the costs of these proceedings taxed in the amount of Two Thousand Two Hundred Three Dollars and twenty-eight cents ($2,203.28).

It is further ordered that, on or before July 23, 1982, respondent shall:

1. Notify all clients being represented in pending matters and any co-counsel of his disbarment and his consequent disqualification to act as an attorney after the effective date of this order, and, in the absence of co-counsel, also notify the clients to seek legal service elsewhere, calling attention to any urgency in seeking the substitution of another attorney in his place;

2. Regardless of any fees or expenses due respondent, deliver to all clients being represented in pending matters any papers or other property pertaining to the client, or notify the clients or co-counsel, if any, of a suitable time and place where the papers or other property may be obtained, calling attention to any urgency for obtaining such papers or other property;

3. Refund any part of any fees or expenses paid in advance that are unearned or not paid, and account for any trust money or property in possession or control of respondent;

4. Notify opposing counsel in pending litigation or, in the absence of counsel, the adverse parties, of his disqualification to act as an attorney after the effective date of this order, and file a notice of disqualification of respondent with the court or agency before which the litigation is pending for inclusion in the respective file or files;

5. All notices required by this order shall be by certified mail and shall contain a return address where communications may thereafter be directed to respondent.

6. File with the Clerk of this Court and the Disciplinary Counsel of the Supreme Court an affidavit showing compliance with this order, and proof of service of notices required herein. Such affidavit shall also set forth the address where the affiant may receive com-

munications and the Clerk and Disciplinary Counsel shall be kept advised of any change of address;

7. Retain and maintain a record of the various steps taken by respondent pursuant to this order.

It is further ordered that the Clerk of this Court issue certified copies of this order as provided for in Section 20 of Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.

APPROVED: /s/FRANK D. CELEBREZZE
CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from Journal 58.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this 23rd day of June, 1982.

THOMAS L. STARTZMAN CLERK

/s/ SAM F. ADKINS, DEPUTY

APPENDIX D

IN THE SUPREME COURT OF OHIO
DISCIPLINARY DOCKET

Dayton Bar Association, and
Leonard Stern—Disciplinary Counsel,
Relators,

-vs-

H.J.T. Herzog,
Respondent.

CASE NO. 395 (DD 82-3)

NOTICE OF APPEAL

(Filed August 5, 1982)

Comes now the Respondent herein by counsel and gives notice that he appeals to the Supreme Court of the United States from the Decision and Order of this Court of June 23, 1982 wherby Respondent was permanently disbarred from the practice of law and Ordered to cease and desist from the same.

RESPECTFULLY SUBMITTED.

/s/HERBERT CREECH
Herbert Creech
Attorney for Respondent
7211 Taylorsville Road
Dayton, Ohio 45424
phone 237-5522

CERTIFICATE OF SERVICE

I certify that a copy hereof was sent by regular U.S. mail to the attorney for each Relator, respectively, this August 2, 1982.

/s/HERBERT CREECH

IN THE SUPREME COURT OF OHIO
DISCIPLINARY DOCKET

Dayton Bar Association, and
Leonard Stern—Disciplinary Counsel,
Relators,

-vs-

H.J.T. Herzog,
Respondent.

CASE NO. 395 (DD 82-3)

AMENDED NOTICE OF APPEAL (IE., OF NOTICE TO SEEK WRIT OF CERTIORARI)

(Filed September 7, 1982)

Comes now Respondent by counsel and amends his originally filed "notice of appeal" made herein August 5,

1982 in the following particulars: that he is seeking from the United States Supreme Court the writ of certiorari and the statute upon which this petition for said writ is based jurisdictionally is 28 U.S.C. 1257 (3), and further, the original "notice" filed herein and the present notice of petition for certiorari are both timely, 28 U.S.C. 2101 (c), United States Supreme Court Rule 20 (2).

The writ of certiorari is sought as a means to have reviewed the June 23, 1982 Decision and Order of this Court whereby the Respondent was permanently disbarred from the practice of law and Ordered to cease and desist therefrom.

RESPECTFULLY SUBMITTED.

/s/ HERBERT CREECH
ATTORNEY FOR RESPONDENT
7211 TAYLORSVILLE ROAD
DAYTON, OHIO 45424
telephone 1-513-237-5522

CERTIFICATE OF SERVICE

I certify that a copy hereof was sent by regular United States mail to the attorney for each relator, respectively, 31 August 1982.

/s/ HERBERT CREECH, ESQUIRE

Office - Supreme Court, U.S.
FILED
OCT 20 1982
ALEXANDER L. STEVAS,

Case No. 82-477

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

H. J. T. HERZOG,

Petitioner,

vs

DAYTON BAR ASSOCIATION and
OFFICE OF DISCIPLINARY COUNSEL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Member of the Supreme Court Bar
Assistant Disciplinary Counsel
Counsel of Record

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COUNSEL FOR RESPONDENT
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COUNSEL FOR RESPONDENT
DAYTON BAR ASSOCIATION

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Rule V(7) of the Ohio Supreme Court Rules for the Government of the Bar:

> Effect of Discipline: . . . A person who has been suspended for an indefinite period from the practice of law and thereafter reinstated in the manner hereinafter provided shall be disbarred upon being found guilty of subsequent misconduct . . .

2. Disciplinary Rule 9-102 (B) (4) of the Ohio Code of Professional Responsibility:

> A lawyer shall promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

3. Disciplinary Rule 6-101 (A) (3) of the Ohio Code of Professional Responsibility:

> A lawyer shall not neglect a legal matter entrusted to him.

4. Disciplinary Rule 2-103 (A) of the Ohio Code of Professional Responsibility:

> A lawyer shall not recommend employment as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

5. United States Constitution, Amendment Fourteen:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.

6. United States Constitution, Amendment One:

> Congress shall make no law . . . abridging the freedom of speech.

7. United States Constitution, Article I, Section 9:

> No Bill of Attainder or ex post facto law shall be passed.

8. United States Constitution, Amendment Five:

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

STATEMENT OF THE CASE

On April 13, 1981, Respondent Dayton Bar Association and the Office of Disciplinary Counsel filed a Complaint against Petitioner with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. The Complaint contained four claims of misconduct under the Ohio Code of Professional Responsibility. A hearing was held before a panel of the Board on November 5, 1981 and November 6, 1981. The Board filed its Findings of Fact and Recommendation with the Ohio Supreme Court on January 29, 1982.

The Board found Petitioner guilty on three of the four claims. The first claim concerned the failure of Petitioner to promptly turn over to his client funds collected on behalf of the client. The Board found this to be a violation of Disciplinary Rule 9—102 (B) (4) of the Ohio Code of Professional Responsibility.

The second claim involved Petitioner's representation of two other clients, the plaintiffs in a personal injury case which was ultimately voluntarily dismissed without either of his clients' consent. The Board found that this conduct was in violation of DR 6—101 (A) (3) which prohibits a lawyer from neglecting a legal matter entrusted to him.

The third claim concerned the mailing by Petitioner of approximately 1,000 letters to persons who were listed as defendants in collection actions filed in the Dayton Municipal Court. Petitioner obtained the names and addresses of these individuals from the "Daily Court Reporter". One letter refers to the suit against the recipient and questions whether or not other creditors are also seeking payment from the recipient. The letter goes on to advise that a new federal law may protect the recipient's employment, possessions and wages. The letter urges the recipient to

contact Petitioner in order "to take advantage of this law" (Appendix A). The second letter states that "the normal sequence of events will mean that judgment will be taken against you and your wages garnisheed. . . " This letter also informs the recipient of the new federal law that would protect the recipient from repossessions, bill collectors, foreclosures and the like. The recipient is urged to contact the office of Petitioner (Appendix B). The Board found that this activity violated DR 2–103 (A) of the Ohio Code of Professional Responsibility.

Petitioner had previously been indefinitely suspended from the practice of law on April 18, 1962. His first Petition for Reinstatement was rejected on January 20, 1972. On the second time Petitioner sought reinstatement, his request was granted (June 19, 1975). Although the Board noted that a suspension for one year from the practice of law would be warranted for the violations of Petitioner, the Board went on to recommend that Petitioner be permanently disbarred pursuant to Section 7 of Rule V of the Ohio Supreme Court Rules for the Government of the Bar. Ohio Gov. Rule V (7) requires the permanent disbarment, upon any finding of further misconduct by a practitioner reinstated after a previous indefinite suspension.

Petitioner filed objections to the report of the Board and the matter was briefed and argued before the Supreme Court of Ohio. Throughout these proceedings, Petitioner raised essentially two arguments: (1) the conduct of Petitioner was not serious enough to warrant permanent disbarment; and (2) the letters mailed by Petitioner to defendents in collection actions were protected under the First Amendment to the United States Constitution.

Petitioner did not, however, ever raise the other questions presented in his Petition for Writ of Certiorari, which relate to the sanction of disbarment. Specifically, the challenges to Ohio Gov. Rule V (7) as violating the equal pro-

tection and the due process clauses of the Fourteenth Amendment to the United States Constitution, the prohibitions against Bills of Attainder and ex post facto laws (Article I, Section 9 of the United States Constitution), and the prohibition of double jeopardy in the Fifth Amendment to the United States Constitution were never raised in these proceedings until the Petition for Writ of Certiorari was filed.

The Supreme Court of Ohio affirmed the Findings of the Board of Commissioners that Petitioner had violated all three disciplinary rules described above. The Ohio Supreme Court ruled that Petitioner be permanently disbarred from the practice of law noting that the violations of the disciplinary rules regarding prompt payment of money to clients and prohibiting the neglect of legal matters were serious enough to require disciplinary action. Since he had previously been indefinitely suspended, permanent disbarment was appropriate pursuant to Ohio Gov. Rule V(7). The Court went on to comment that although the findings of misconduct for solicitation did not affect the result, the potential for overreaching in Petitioner's solicitation of clients would justify a sanction for that misconduct as well.

ARGUMENT IN OPPOSITION TO GRANTING CERTIORARI

A. PETITIONER FAILED TO RAISE AND THE COURT BELOW DID NOT RULE UPON ANY CLAIMS REGARDING THE CONSTITUTIONALITY OF OHIO GOV. RULE V(7).

The record shows that Petitioner did not raise any issues regarding the constitutionality of Rule V(7) of the Ohio Supreme Court Rules for the Government of the Bar. Instead, Petitioner relied upon an argument that since his conduct was not egregious, disbarment was inappropriate. While finding disbarment to be necessary, the Ohio Supreme Court had no opportunity to and did not rule on the constitutional issues presented in the Petition (See Appendix A of Petition).

This Court has repeatedly ruled that it will not decide issues raised for the first time in a Writ of Certiorari. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) and *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Any claim of invalidity of a state statute "and the ground therefor [must] be brought to the attention of the state court with fair precision and in due time". *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Having failed to raise the constitutional issues regarding Ohio Gov. Rule V(7) (Questions 2-6 in the Petition) in a timely manner, Petitioner should be precluded from presenting them to this Court for review.

B. THE DECISION OF THE OHIO SUPREME COURT TO PERMANENTLY DISBAR PETITIONER RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

This Court has recognized the traditional power of the states and their very strong interest in regulating the membership of the bar and the practice of law. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) and *Law Students Research Council v. Wadmond*, 401 U.S. 154, 159 (1971). In Ohio, a determination has been made that a finding of misconduct after an indefinite suspension and reinstatement warrants the most severe sanction: permanent disbarment. This rule in effect January 1, 1957, was contained in Supreme Court Practice Rule XXVII, the predecessor to Ohio Gov. Rule V. *See*, Schroeder, O., *Lawyer Discipline: The Ohio Story*, pp. 16-23, 141 (1967) and *Cleveland Bar Association v. Pleasant*, 167 Ohio St. 325 (1958).

Petitioner's latest violations of the disciplinary rules include the neglect of a client's legal action and the failure to promptly return client's funds to that client, both serious violations of the mandatory rules. *See*, DR 9-102 (B) (4) and 6-101 (A) (3). In view of Petitioner's previous indefinite suspension, the Supreme Court simply applied Ohio Gov. Rule V(7) and ruled that Petitioner be disbarred.

The evaluation of a practitioner's conduct and appropriate discipline to be employed are questions of state law, not federal law. *See, e.g., In re Witte*, 615 S. W. 2d 421, *cert. denied*, 102 S. Ct. 559 (1981). The decision of the Ohio Supreme Court regarding Petitioner's fitness to practice law thus rests on adequate and independent state grounds, not properly before this Court. *Herb v. Pitcarin*, 324 U.S. 117, 125 (1945) and *Jankovich v. Indiana Toll Road Comm.*, 379 U.S. 487, 489 (1965).

Even assuming that Petitioner's constitutional claims may properly be raised before this Court, none of those claims raises a substantial federal question. Petitioner admits that the state need only show a rational basis for

Ohio Gov. Rule V(7) to reject an equal protection challenge (Petition, p. 9). A conclusion that two separate incidents of serious misconduct require that an attorney be disbarred is clearly a reasonable distinction between Petitioner and other practitioners. *Cf, In re Professional Ethics Advisory Comm. Op.*, 444 A. 2d 1092, 1102 (N.J. Sup. Ct. 1982) *appeal docketed*, 51 U.S.L.W. 3075 (July 26, 1982) (No. 82-139) and *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464-466 (1981). Petitioner's argument regarding due process likewise lacks merit. *In re Ruffalo*, 390 U.S. 544 (1968).

Restrictions in effect prior to Petitioner's first penalty for misconduct are "proper qualifications for a profession" and violate neither the Bill of Attainder clause not the ex post facto clause of Article I. *DeVeau v. Braisted*, 363 U.S. 144, 166 (1960). *See also, Weaver v. Graham*, 450 U.S. 24, 29 (1981). Even assuming that the double jeopardy clause applied to these proceedings, Petitioner's claim of double jeopardy does not comport with the facts. Petitioner received one sanction — permanent disbarment — not two as alleged on pages 14-15 of the Petition. Finally, attorney disciplinary proceedings are *sui generis*, not criminal, and the full panoply of constitutional rights available to defendants in criminal cases has never been held to be available in attorney disciplinary proceedings.

C. A FINDING THAT PETITIONER'S LETTERS VIOLATED DR 2-103 (A) IS CONSISTENT WITH RECENT DECISIONS OF THIS COURT AND DECISIONS FROM OTHER STATE COURTS.

Petitioner's letters (Appendix A and B) reflect the "abuses that the states have a legitimate interest in con-

trolling". *In the Matter of RMJ*, 102 S. Ct. 929, 937 (1982). Petitioner targetted the letters to persons with whom he had no previous contact solely for the purpose of obtaining remunerative employment. The recipients were defendants at risk of economic loss in pending court proceedings and were thus particularly vulnerable to this type of solicitation. Such solicitation is inherently overbearing and intrusive and thus falls within the area where state interests are particularly strong. *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447, 464-468 (1978); *Florida Bar Assoc. v. Schrieber*, 407 So. 2d 595, 599 (1981); and *Kansas v. Moses*, 642 P. 2d 1004, 1007 (1981). *Cf In the Matter of Greene*, 433 N.Y.S. 2d 853 (Sup. Ct. 1980), 54 N.Y. 2d 118 (1981), *cert. denied*, 102 S. Ct. 1738 (1982). Furthermore, rather than serving an informational purpose, these letters constitute scare tactics designed to lure the consumer into Petitioner's office regardless of individual circumstances. This type of misleading and deceptive promotional language may properly be restricted by Ohio to protect the public. *Ohralik*, *supra*, at 459; *In re Primus*, 436 U.S. 412, 426 (1978). *Cf Friedman v. Rogers*, 440 U.S. 1, 15 (1979).

Thus, there is no conflict between Ohio's regulation of Petitioner's direct mail solicitation and the decisions cited by Petitioner in his brief (page 7). Each case applies the principle that where accurate, factual information is conveyed to the public, the state may not discipline the attorneys for simply conveying that information. None of these cases, however, involved solicitation which is misleading to the consumer. *See, e.g., In the Matter of Koffler*, N.Y. 2d 140, 146 (1980) *cert. denied*, 450 U.S. 1026 (1981). The State of Ohio may regulate the solicitation of Petitioner in order to protect the public from overreaching and deception by members of the Bar.

CONCLUSION

This Court must first determine whether it should hear constitutional challenges to a long-standing rule of the Ohio Supreme Court that have not been raised at any prior time in these proceedings. Respondents submit that these questions should not be considered by this Court.

Secondly, as to the constitutionality of the applications of DR 2-103(A) to the facts at hand, Respondents submit that even if this Court determined the application was improper, such a determination would not affect the Ohio Supreme Court's disposition of this case based upon the clear finding of professional misconduct for failure to timely reimburse a client's funds and neglect of a separate legal matter. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been served upon the Petitioner, H. J. T. Herzog, by forwarding such copies to the office of his counsel, Herbert Creech, Jr., 7211 Taylorsville Road, Dayton, Ohio, 45424, by United States mail, first class postage prepaid, this 20th day of October, 1982. I further certify that all parties required to be served have been served.

Charles W. Kettlewell
Counsel of Record for Respondent
Office of Disciplinary Counsel

APPENDIX A

LAW OFFICES
H. J. T. HERZOG
HARRIES BLDG.
137 N. MAIN STREET
DAYTON, OHIO 45402
222-3781

You were sued in the Dayton Municipal Court. Are other creditors and bill collectors after you?

There is a new federal law that can save your job, car, bank account, stop repossessions and garnishments and gas and electric turn-offs.

To learn how to take advantage of this law, call for an appointment at your own convenience, including evenings or Saturdays. Ask for Mrs. Carter.

Be sure to say what the appointment is for so forms to list necessary information can be sent to you.

Remember, this is not bankruptcy.

Very truly yours,

/s/ H. J. T. HERZOG

HJTH:blw
DP—C

APPENDIX B

LAW OFFICES
H. J. T. HERZOG
HARRIES BLDG.
137 N. MAIN STREET
DAYTON, OHIO 45402
222-3781

February 19, 1980

Mr. and Mrs. Lary Eugene Snell
5309 Weddington Drive
Trotwood, OH 45426

Dear Mr. and Mrs. Snell:

The Daily Court Reporter lists you as a Defendant in a collection suit.

The normal sequence of events will mean judgment will be taken against you and your wages garnisheed; your assets, including your bank account and car or cars attached; and if you own real estate, a lien placed against it, which could be the basis for a suit to sell your real estate.

Garnishment by one creditor could not be cause for your employer to fire you; however, it is rare that you would only have one creditor so delinquent that suit was necessary. If two creditors started garnishments, you could legally be fired by your employer.

There are remedies available to you to prevent garnishment. A new federal law protects you from bill collectors, repossessions, home foreclosures, gas and electric turn-offs, garnishments, sale of your car and other assets.

You also have options under the new federal laws to protect your job and bank accounts. And you can not only stop bill collectors, but even governmental agencies.

To learn about these remedies, call for an appointment to review your problems. Ask for Mrs. Adams.

You will need to bring certain information to help decide the best course for you. Forms to list the information will be sent to you to bring to your appointment.

Appointments can be made at your convenience in the evening and on Saturdays.

Very truly yours,

/s/ H. J. T. HERZOG

HJTH:blw